

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**BRENT J. LONG**

Claimant

v.

**ULTRAFAB, INC.**

Respondent

and

**PENNSYLVANIA MANUFACTURERS'  
ASSOCIATION**

Insurance Carrier

Docket No. 1,070,791

**ORDER**

Claimant requests review of the March 30, 2015, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Claimant appears by counsel, E. Thomas Pyle, III. Respondent and insurance carrier (respondent) appear by counsel, J. Scott Gordon.

**ISSUES**

The Administrative Law Judge (ALJ) denied claimant's request for preliminary relief because claimant failed to establish a need for treatment for injuries by accident alleged on November 7, 2013. The ALJ found claimant did not prove his accident was the prevailing factor causing claimant's rectal bleeding, abdominal hernia, neck and shoulder pain, and paresthesias of the upper extremities.

Claimant argues he proved he sustained a compensable accident that was the prevailing factor causing his neck and shoulder pain and paresthesia of the upper extremities.<sup>1</sup> Claimant contends the ALJ erred in denying his request for medical treatment when the only evidence is the uncontroverted medical report of Dr. Hufford. Claimant maintains the ALJ violated his constitutional rights of due process and equal protection by depriving him of a right to a preliminary hearing.

Respondent emphasizes the lack of reference to a cervical spine injury in claimant's medical records. Respondent also contends claimant's constitutional rights were not violated because claimant's counsel requested the ALJ enter a preliminary hearing Order

---

<sup>1</sup> No issue is raised before the Board regarding claimant's rectal bleeding and hernia.

for medical treatment without a preliminary hearing. Respondent requests the Board affirm the ALJ's denial of medical treatment.

The issues are:

1. Is claimant's personal injury by accident the prevailing factor causing his neck and shoulder pain, and paresthesia of his upper extremities?
2. In denying claimant's request for medical treatment, did the ALJ disregard Dr. Hufford's uncontradicted medical opinions?
3. Did the ALJ deny claimant's constitutional rights of due process and equal protection by failing to hold a preliminary hearing?

#### **FINDINGS OF FACT**

1. Claimant filed an application for hearing on August 14, 2014, alleging an accident on November 7, 2013, when he was "electrocuted," and sustained injuries to his "left hand, right elbow, abdominal (hernia), general body injuries & all body parts affected."

2. On October 1, 2014, claimant filed an application for preliminary hearing. Accompanying the application were medical records and reports, as required by K.S.A. 2013 Supp. 44-534a(a)(1). Those records were not marked as exhibits, offered into evidence, or admitted into evidence by the ALJ. The parties did not stipulate the medical records into evidence.

3. Claimant's application for preliminary hearing application was ultimately scheduled for preliminary hearing on February 10, 2015.

4. On February 9, 2015, counsel notified the ALJ the parties had agreed to request a neutral IME in lieu of the preliminary hearing. Counsel also notified the ALJ that the parties agreed to continue the hearing.

5. On February 13, 2015, counsel for the parties informed the ALJ that an agreement had been reached that Dr. David Hufford be appointed to perform the IME.

6. On February 16, 2015, the ALJ entered an order appointing Dr. Hufford as a neutral physician to perform the IME. The order requested Dr. Hufford to:

... examine Claimant, review pertinent medical records, and offer opinions as to the following: diagnosis; recommendations for treatment; and whether Claimant's alleged accident of November 7, 2013 is the prevailing factor in causing Claimant's current condition, need for treatment or resulting impairment or disability, if any.

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor.”<sup>2</sup>

7. The ALJ’s order appointing Dr. Hufford provided “[c]ounsel will have seven (7) days after receipt of the IME report to offer their written arguments/comments with respect to Claimant’s preliminary hearing requests, or to request further evidentiary hearing.” The order further provided that “[r]egardless of whether written comments are received, if no request for further hearing is received, the court will proceed to enter an order.”

8. The ALJ received Dr. Hufford’s report on March 23, 2015. Both counsel provided e-mail to the ALJ requesting an order be entered finding in favor of their respective clients. Neither party requested to place additional evidence into the record.

9. Dr. Hufford’s report indicates he examined claimant on March 17, 2015. The doctor reviewed medical records and reports provided via a joint letter from counsel. He performed a physical examination. Much of Dr. Hufford’s report concerns the cause of claimant’s umbilical hernia and rectal bleeding. However, Dr. Hufford states in of his report:

Mr. Long does, however, have neck pain and paresthesias of the upper extremities and based on his mechanism of injury including a loss of consciousness for an undetermined length of time there does appear to be a need for treatment to the cervical spine. His work injury is more likely than not the acute tissue trauma that represents the prevailing factor resulting in this need for further treatment. This should include but is not limited to physical therapy, the performance of an MRI examination and electrodiagnostic testing of the upper extremities to exclude other conditions such as median nerve entrapment unrelated to the specific work incident. No temporary work restrictions are warranted. No statement regarding his current and ongoing low back pain from a separate work incident is offered or implied.<sup>3</sup>

10. In denying claimant’s request for medical treatment, the ALJ noted:

Claimant now alleges neck and shoulder pain, and paresthesia of the upper extremities, which complaints are first documented more than 16 months after the work accident. Claimant has failed to establish that the work accident was the prevailing factor in causing those later-developing complaints, or need for treatment of those complaints.<sup>4</sup>

---

<sup>2</sup> ALJ Order (Feb. 16, 2015) at 1.

<sup>3</sup> Hufford Report (Mar. 17, 2015) at 3-4.

<sup>4</sup> ALJ Order (Mar. 30, 2015) at 1.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-501b provides in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(f) provides in part:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2013 Supp. 44-508(g) provides:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

After reviewing the evidence, the undersigned Board Member concludes the preliminary hearing Order should be reversed and the claim remanded to the ALJ with directions to enter an order appointing an authorized physician capable of providing the treatment and testing recommended by Dr. Hufford for claimant’s neck and upper extremity symptoms.

This Board Member disagrees with the ALJ regarding the cause of claimant’s symptoms in his neck, shoulders and paresthesias of the upper extremities. The only item of evidence in this record is Dr. Hufford’s report.<sup>5</sup> That report clearly indicates claimant’s accident was the prevailing factor in causing claimant’s neck and upper extremity symptoms.

There is a group of medical records and reports in the ALJ’s file that were submitted to the Division by claimant’s counsel when he filed the application for preliminary hearing. The ALJ clearly relied on those records in considering the compensability of this claim. However, those records and reports were never marked, offered or admitted into evidence. Such records and reports are not a part of the evidentiary record.

Preliminary hearings are intended to be summary in nature,<sup>6</sup> and at such proceedings, medical reports and records shall be considered by the ALJ.<sup>7</sup> But, the medical documentation submitted with claimant’s E-3 filing was not offered or stipulated into evidence.

Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.<sup>8</sup> Dr. Hufford’s opinions are uncontroverted and there is no evidence demonstrating his opinions are improbable or unreasonable.

---

<sup>5</sup> See K.S.A. 44-516 and K.A.R. 51-9-6.

<sup>6</sup> K.S.A. 44-534a(a)(2).

<sup>7</sup> K.A.R. 51-3-5a(a).

<sup>8</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

1. Claimant sustained personal injury by accident arising out of and in the course of his employment, and proved his accident was the prevailing factor causing his neck and shoulder pain, paresthesias of his upper extremities and claimant's need for diagnostic testing and treatment recommended by Dr. Hufford.

2. The other issues are moot.

### **DECISION**

**WHEREFORE**, the undersigned Board Member finds the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated March 30, 2015, is reversed and the claim remanded to the ALJ with directions to enter an order appointing an authorized physician capable of providing the treatment and testing recommended by Dr. Hufford for claimant's neck and upper extremity symptoms.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2015.

---

HONORABLE GARY R. TERRILL  
BOARD MEMBER

c: E. Thomas Pyle, III, Attorney for Claimant  
pylelaw@sbcglobal.net

J. Scott Gordon, Attorney for Respondent and its Insurance Carrier  
sgordon@mgbp-law.com

Honorable Bruce E. Moore, Administrative Law Judge

---

<sup>9</sup> K.S.A. 44-534a(a)(2).